

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

KEVIN SMITH,)
Plaintiff,) No. 15 CH 18077
v.) Calendar 13
THE POLICE BOARD OF THE CITY OF) Judge Anna H. Demacopoulos
CHICAGO, et al.)
Defendants.)

MEMORANDUM OPINION AND ORDER

This matter comes before the Court for administrative review of the November 19, 2015 final decision of the Police Board of the City of Chicago (“Board”) which upheld the Superintendent of the Chicago Police Department’s (“Superintendent”) charges and terminated Officer Kevin Smith’s (“Officer Smith”) employment effective on the same date. Having reviewed the briefs, administrative record including the hearing transcript and surveillance videos, and having heard arguments of counsel on September 21, 2016, the Court finds as follows:

BACKGROUND

Officer Smith was employed as a Chicago Police Officer for approximately 16 years at the time of his termination. The Superintendent brought charges arising from an incident at a Walmart in Hammond, Indiana that occurred on October 29, 2013. The Superintendent charged, and the Board found, that Officer Smith, while intoxicated in public, participated in an attempted retail theft of three televisions and a car stereo. The Board further found that Officer Smith made

inconsistent statements shortly after the incident to Walmart security and Hammond police than the statements he made to the Bureau Internal Affairs (“BIA”) nine months later.

Officer Smith was charged with violation of the following Rules of Conduct: Rule 1 - Violation of any law or ordinance; Rule 2 - Any action or conduct which impedes the Department’s efforts to achieve its policy and goals or brings discredit upon the Department; Rule 14 - Making a false report, written or oral; and Rule 15 - Intoxication on or off duty. In its Findings and Decisions following a hearing held on September 15, 2015, the Board found that the Superintendent had proven all charges by a preponderance of the evidence and ordered termination of Officer Smith’s employment.

Findings and Decision of the Board

At the hearing, Officer Smith testified that he arrived at Walmart on October 29, 2013 in search of a Wii gaming system and a small television priced around \$150. Officer Smith conferred with a Walmart employee who retrieved a Wii; however, Officer Smith did not purchase the Wii. Officer Smith then spoke with an unknown individual (who was also dressed as a Walmart sales associate, but was not the same associate he spoke with regarding the Wii). Officer Smith testified that he followed the unknown individual (“impostor”) through the store so that the imposter could show him certain televisions on sale. The Board did not find Officer Smith’s testimony credible as to why he allowed the imposter to place three televisions in his cart and accompanied the imposter through the store, including to the garden department—a relatively secluded part of the store without other customers and where the store’s video system

did not capture every area. (PB 010-011)¹. Instead, the Board found reliable the surveillance videos, as well as the testimony of the Walmart asset protection employee Benjamin Davis.

It was undisputed that the televisions in Officer Smith's cart were each protected with "spider wire," which includes an electronic alarm that sounds a "loud chirping noise for several minutes" at the time they were placed in his cart. It was also undisputed that the spider wire was later recovered by Walmart staff in a grill in the garden center. Mr. Davis credibly testified that he heard a similar alarm from outside the garden center. The Board found that Officer Smith was in close enough proximity that he saw the imposter cut the spider wire off the electronics and heard the alarm go off, however "he did not report when was going on to anyone, took no action with respect to the thief, but instead thereafter accompanied the thief with the electronic equipment to the front of the store, in an effort to walk it out of the store." (PB 012). Had they not been intercepted by Walmart asset protection staff, the Board concluded that the imposter and Officer Smith would have exited the store with over \$876 in merchandise.

The breathalyzer test administered approximately five hours after Officer Smith was detained at the store registered .107 blood alcohol concentration. During this time, Officer Smith was in the custody of Walmart security staff, the Hammond police, and/or BIA and was not consuming any alcohol.

On October 29, 2013, the Board found Officer Smith told Mr. Davis that "he had the wrong guy and that, as a police officer, he was going to apprehend the thief." Although Officer Smith later denied making these statements, the Board found Mr. Davis' testimony credible. (PB 013). The Board found that Officer Smith told Sgt. Garrison of the Hammond Police Department

¹ Citations to the Administrative Record appear as (PB ____).

that “he was about to apprehend the thief but that he could not find anyone to tell about the thief’s activities.” Again Officer Smith denied this, but the Board found “Sergeant Garrison’s testimony unimpeached and credible on this point” and Officer Smith’s denial “not believable.” (PB 013).

Finding that Officer Smith had violated all four of the rules as charged by the Superintendent, the Board determined that cause existed for his discharge. The Board stated that the Officer Smith’s assistance in the attempted shoplifting and making multiple intentional false statements warranted discharge, “[s]eparate and apart from the rule violations relating to being intoxicated.” (PB 015). The Board held that Officer Smith “exhibited a significant lack of integrity, honest, and trustworthiness, and this misconduct, by itself, is incompatible with continued service as a police officer. Permitting [Officer Smith] to remain on the job would undermine public confidence in the honesty and integrity of the police force.” (PB 015).

STANDARD OF REVIEW

A trial court's scope of review of an administrative agency's decision regarding discharge is a two-step analysis. *Rodriguez v. Weis*, 408 Ill. App. 3d 663, 668 (1st Dist. 2011). The first step requires the reviewing court to determine whether the administrative agency's findings of fact were contrary to the manifest weight of the evidence. *Id.* Second, the reviewing court must determine if the findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge exists. *Id.*

ANALYSIS

On administrative review, Officer Smith argues that the Board abused its discretion in numerous respects during the hearing and in its Findings and Decision such that the Board’s

factual findings giving rise to the finding of guilty are against the manifest weight of the evidence. Officer Smith also alleges certain due process violations arising out of the Superintendent's failure to produce the imposter at the hearing, admission of the results of the breathalyzer, and various other evidentiary objections made at the hearing. For the following reasons, the Court affirms the Board's final decision dated November 19, 2015 which resulted in Officer Smith's termination.

I. The Board's factual findings are not against the manifest weight of the evidence.

The Administrative Review law requires that upon review “[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.” 735 ILCS 5/3-110. This complaint for administrative review presents issues of fact, such as the credibility of witnesses, to which the manifest weight of the evidence standard applies. *Bd. of Educ. v. Pollastrini*, 2013 IL App (2d) 120460, ¶15 (2d Dist. 2013). An agency's factual findings are not contrary to the manifest weight of the evidence unless the court, after viewing the evidence in the light most favorable to the agency, concludes that no rational trier of fact could have agreed with the agency's decision and an opposite conclusion is clearly evident. *Daniels v. Police Bd. of City of Chicago*, 338 Ill. App. 3d 851, 858 (1st Dist. 2003). In deciding whether the factual findings are clearly against the manifest weight of the evidence, a court does not reweigh the evidence, make determinations of the credibility of witnesses, or otherwise substitute its judgment for that of the agency. *Lyon v. Dep't of Children & Family Servs.*, 209 Ill.2d 264, 271 (2004).

In his opening brief, Officer Smith generally challenges three categories of factual findings as against the manifest weight of the evidence. First, he argues the breathalyzer results do not support a finding of intoxication and admission thereof was improper because the

machine was not working properly. Second, he contends the Board's conclusion that he aided the imposter and participated in the attempted retail theft is unsupported. Finally, he disputes the charge of making a false report concerning the statements he made on the date of the incident and then nine months later

As an initial matter, Officer Smith's objections to the breathalyzer results and findings as to his intoxication are rather baffling given that his papers are replete with admissions that he was impaired by the effects of alcohol at the time of the incident on October 29, 2013. Indeed, Officer Smith argues with much detail that such impairment excuses or explains his alleged failure to realize he was associating with the imposter and attempted thief. The two arguments cannot be reconciled. Notwithstanding Officer Smith's admissions, the Board properly considered the results of the breathalyzer. There is sufficient evidence in the record that the breathalyzer was working properly as to measure a person's level of intoxication. Foundation for the admission of the breathalyzer was offered by the testimony of Sergeant Christopher Pettis of BIA who testified that the date can be negated manually and has no impact the on accuracy of the reading. (PB 121-122.) Formal or technical rules of evidence are not required in a proceeding before the Board. *Comito v. Police Bd. of Chi.*, 317 Ill. App. 3d 677, 691 (1st Dist. 2000). Other evidence of the machine's reliability includes the calibration test performed by the Illinois State Police on October 2, 2013 and the blank test done before testing Officer Smith. (PB 118-120). Moreover, independent of the machine's results, the observations of Mr. Davis and Sergeant Garrison support the Board's finding that Officer Smith was intoxicated at the time of the incident. (PB 107; 114).

A finding of intoxication in a public place such as a Walmart supports the Board's findings as to violation of Rules 1, 2 and 15.² With regard to violation of Indiana Code 7.1-5.1.3, it is important to note that an officer need not be criminally convicted or even charged for the Board to decide that a violation of Rule 1 has occurred.³ See e.g. *Schlobohm v. Rice*, 157 Ill. App. 3d 90 (1st Dist. 1987). Moreover, in a dismissal proceeding against a police officer, the preponderance of the evidence standard applies even if criminal conduct is involved. *Id.* at 96 (cocaine use); *Thornton v. University Civil Service Merit Board* 154 Ill. App. 3d 1016, 1019 (5th Dist. 1987) (gambling). Accordingly, it was not against the manifest weight of the evidence to find Officer Smith was intoxicated at the Hammond Walmart on October 29, 2013 and as a result violated Rules 1, 2 (Count I), and 15.

Officer Smith challenges the Board's finding that he aided the imposter. He argues that no credible evidence was put forth that Officer Smith knew the unknown individual, that the unknown individual was not a Walmart employee, and that there were innocent reasons why Officer Smith accompanied the imposter for more than thirteen minutes, including Officer Smith's intoxication. Officer Smith further asserts that the Board misrepresented his testimony concerning whether he heard the spider wire alarm, whether he had been in such proximity to the imposter such that he saw the spider wires removed, and whether he should have recognized the sound of the alarm based upon his experience as a police officer.

² Rule 1: Violation of any law or ordinance.

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department.

Rule 15: Intoxication on or off duty.

Having read the hearing transcript and viewed the fourteen Walmart surveillance videos, the Court finds that there is ample support in the record for the Board's finding that Officer Smith aided the imposter. Upon administrative review, it is not the province of this Court to make credibility determinations, only to determine whether the Board's findings are not against the manifest weight of the evidence. The Board expressly stated that it "does not credit Officer's Smith's testimony. Rather, the Board credits the video surveillance of Officer Smith, as well as the testimony of Walmart asset protection employee Ben Davis." (PB 10). As to whether the imposter was a Walmart employee, Mr. Davis testified that he knew the man was not an employee because he did the store's employee orientation for every employee at the store. (PB 94-95). The Board's conclusions concerning whether Officer Smith should have recognized the sound of the spider wire alarm is supported by Officer Smith's testimony that he had made plenty of retail theft arrests. (PB 87). He further testified that he had heard alarms go off in the course of his duties as an officer, and if an alarm goes off, it is cause for concern. (PB 142). The Board's finding that Officer Smith aided the imposter is not against the manifest weight of the evidence.

Finally, Officer Smith argues that the Board's finding that he made false statements to Mr. Davis and/or Sgt. Garrison on the date of the incident or to BIA when interviewed in 2014 are against the manifest weight of the evidence. Sgt. Garrison and Mr. Davis testified that Officer Smith told them that he knew the imposter was a thief and had planned to arrest him, but Walmart security did not give him a chance. (PB 99, 124-125). When interviewed by Sgt. Torres of BIA, Officer Smith stated that nothing the impersonator did at the time led him to believe the man was a thief. (PB 169-170). Here again, the Board made findings of credibility which this Court may not review, expressly finding the testimony of Mr. Davis and Sgt. Garrison believable

over that of Officer Smith. (PB 013). The Board's finding that Officer Smith made false statements to BIA in 2014 and/or Sgt. Garrison and Mr. Davis on October 29, 2013 is not against the manifest weight of the evidence.

II. The Court finds no due process violations

Officer Smith contends that the Superintendent's failure to produce the imposter at the hearing, the admission of the results of the breathalyzer, and various rulings on other evidentiary objections made at the hearing violated his due process rights.

"Administrative hearings are governed by the fundamental principles and requirements of due process of law." *Sangirardi v. Vill. of Stickney*, 342 Ill. App. 3d 1, 11 (1st Dist. 2003). A fair hearing before an administrative body "must include the opportunity to be heard, the right to cross-examine adverse witnesses, and impartial rulings on the evidence." *Abrahamson v. Ill. Dep't of Prof'l Regulation*, 153 Ill.2d 76, 95 (1992). However, not all requirements of due process in the trial of a case are necessary at an administrative hearing. *Sangirardi*, 342 Ill. App. 3d at 16. Whether a party's due process rights were violated during the administrative hearing is a question of law. *Valley View Cmtys. Unit School Dist. No. 365*, 2013 IL App (3d) 120373.

Officer Smith does not dispute that the imposter fled the Walmart just as the two men were exiting the store with the cart containing the unpaid merchandise. The surveillance video shows that the imposter abruptly abandons the cart and sprints towards the parking lot while Officer Smith is detained. Having offered no law requiring the Superintendent to produce the imposter, an individual not under the Superintendent's control, the Court finds no due process violations related to the absence of the imposter at the hearing.

As to the admission of the breathalyzer results, as noted above, adequate foundation was laid for the admission of the breathalyzer results by the testimony of Sgt. Pettis who, among

other things, explained that the date could be manually set and that the date on the ticket was 10 years off did not relate to the accuracy of the results. Officer Smith was given an opportunity to cross-examine Sgt. Pettis regarding the breathalyzer's results and also this issue was also briefed by the parties before the hearing. Finally, as previously noted, Officer Smith admits that he was intoxicated. He argues vigorously in the briefs and through counsel at the September 21, 2016 hearing before this Court that his conduct on the date of the incident was due to his intoxication. Accordingly, the Court finds no due process violations arising from the admission of the breathalyzer results.

Lastly, Officer Smith argues that the Hearing Officer's ruling on certain objections, which addressed, among other things, the admission of the 2014 BIA statements, asking Officer Smith to narrate the video, admission of the notice of restriction against Officer Smith from the Walmart store, and allowing the City to set off a spider alarm at the administrative hearing. As previously noted, the formal rules of evidence are not required in a proceeding before the Board. *Comito*, 317 Ill. App. 3d at 691. Moreover, the Administrative Review Law provides that “[t]echnical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her.” 735 ILCS 5/3-111(b). The Court finds that none of the objection rulings to which Officer Smith now objects constitute more than mere technical error, if any. Moreover, Officer Smith has not demonstrated how the various rulings “materially affected” his rights and “resulted in substantial injustice to him.” Accordingly, the Court finds no due process violations arising from any of the ruling on objections argued by Officer Smith.

III. Cause for discharge exists.

Having found that the fact findings of the Board are not against the manifest weight of the evidence, the Court must consider whether “cause” for discharge exists such that the Board’s termination of Officer Smith should be affirmed. A reviewing court will test the cause element by determining whether the agency’s decision is arbitrary and unreasonable or unrelated to the requirements of the service. *Rodriguez*, 408 Ill. App. 3d at 668. Illinois courts have defined “cause” for discharge as some “substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public opinion recognize as good cause for his no longer holding the position.” *Rodriguez*, 408 Ill. App. 3d at 671 (*quoting Collins v. Board of Fire & Police Commissioners*, 84 Ill. App. 3d 516, 521 (1980)). Because the Board “is in the best position to determine the effect of an officer's conduct on the department, the reviewing court is required to give the Board's determination of cause for terminating an officer considerable deference.” *Rodriguez*, 408 Ill. App. 3d at 671 (*quoting Sangirardi v. Vill. of Stickney*, 342 Ill. App. 3d 1, 18 (1st Dist. 2003); *see also Walsh v. Board of Fire & Police Commissioners*, 96 Ill.2d 101, 105-06 (1983) (an “administrative tribunal's finding of ‘cause’ for discharge commands our respect, and it is to be overturned only if it is arbitrary and unreasonable or unrelated to the requirements of the service”). Lastly, a Board’s decision will stand even if the Court were to consider another, more lenient, sanction more appropriate. *See e.g. Sutton v. Civil Service Commission*, 91 Ill.2d 404, 411 (1992); *Kappel v. Police Board of Chicago*, 220 Ill. App. 3d 580, 590 (1st Dist. 1991).

In this case, the Board has applied the harshest sanction—termination. At first blush, the sanction may seem unduly harsh. Evidence in the record showed Officer Smith has received numerous awards and complimentary decorations only to be offset by the instant violations.

However, the Board was deliberate with its findings and expressly limited its bases for discharge to the rule violations arising from Officer Smith's false statements and attempted retail theft, thus disregarding the violations related to his intoxication. The Board held that via such conduct, Officer Smith "exhibited a significant lack of integrity, honest, and trustworthiness, and this misconduct, by itself, is incompatible with continued service as a police officer." (PB 015). Were the Board to allow Officer Smith to continue with the Chicago Police Department, it would "undermine public confidence in the honest and integrity" of the CPD. *Id.* Part of a police officer's duties include testifying in court. Such a blemish on his record, would indeed make it challenging for him Officer Smith to ever testify credibly in court. The Board's decision to discipline was not based upon the number of Officer Smith's rule violations or even the severity thereof. Rather, the Board based its decision, on the nature of the conduct giving rise to the violations and their effect on public confidence. Accordingly, the Court finds that cause for discharge exists. The Board's chosen sanction is neither arbitrary nor unreasonable, and it is decidedly related to the requirements of service.

IT IS HEREBY ORDERED:

The November 19, 2015 decision of the Board discharging Officer Smith is affirmed.

ENTERED:



Judge Anna H. Demacopoulos

Judge Anna Helen Demacopoulos

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Circuit Court – 2002